

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Oct 13, 2021

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

KERRY P.,

Plaintiff,

v.

KILOLO KIJAKAZI, ACTING
COMMISSIONER OF SOCIAL
SECURITY,¹

Defendant.

NO: 1:20-CV-03136-SAB

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT

BEFORE THE COURT are the parties' cross motions for summary judgment. ECF Nos. 13, 14. This matter was submitted for consideration without oral argument. Plaintiff is represented by Attorney D. James Tree. Defendant is

¹Kilolo Kijakazi became the Acting Commissioner of Social Security on July 9, 2021. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Kilolo Kijakazi is substituted for Andrew M. Saul as the defendant in this suit. No further action need be taken to continue this suit. *See* 42 U.S.C. § 405(g).

1 represented by Special Assistant United States Attorney Joseph J. Langkamer. The
2 Court has reviewed the administrative record, the parties' completed briefing, and
3 is fully informed. For the reasons discussed below, the Court **GRANTS**
4 Defendant's Motion for Summary Judgment, ECF No. 14, and **DENIES** Plaintiff's
5 Motion for Summary Judgment, ECF No. 13.

6 JURISDICTION

7 Plaintiff Kerry P.² protectively filed applications for Social Security
8 Disability Insurance (SSDI) and Supplemental Security Income (SSI) on December
9 18, 2017, Tr. 79-80, alleging an onset date of November 1, 2017, Tr. 263, 272,
10 275, due depression, posttraumatic stress disorder (PTSD), attention deficit
11 hyperactivity disorder (ADHD), social anxiety, nightmares, Asperger's, borderline
12 personality disorder, anxiety, seizures, and alcohol, meth, heroin, opioid, and
13 cannabis use disorder, Tr. 324. Plaintiff's application was denied initially, Tr. 145-
14 48, and upon reconsideration, Tr. 151-56. A hearing before Administrative Law
15 Judge C. Howard Prinsloo ("ALJ") was conducted on September 5, 2019. Tr. 40-
16 66. Plaintiff was represented by counsel and testified at the hearing. *Id.* The ALJ
17 also took the testimony of vocational expert Robert Simmons. *Id.* The ALJ denied
18

19 ²In the interest of protecting Plaintiff's privacy, the Court will use Plaintiff's
20 first name and last initial, and, subsequently, Plaintiff's first name only, throughout
21 this decision.

1 benefits on September 23, 2019. Tr. 16-28. The Appeals Council denied review
2 on July 15, 2020. Tr. 1-6. Plaintiff requested judicial review of the ALJ decision
3 by this Court on July 5, 2017. Therefore, the ALJ's decision became in the final
4 decision of the Commissioner. The matter is now before this Court pursuant to 42
5 U.S.C. §§ 405(g). ECF No. 1.

6 **BACKGROUND**

7 The facts of the case are set forth in the administrative hearing and
8 transcripts, the ALJ's decision, and the briefs of Plaintiff and the Commissioner.
9 Only the most pertinent facts are summarized here.

10 Plaintiff was 26 years old at the alleged onset date. Tr. 262. She completed
11 high school in 2009. Tr. 325. Plaintiff worked as a barista, caregiver, house
12 keeper, laborer, and night stocker. Tr. 326. At application, she stated that she
13 stopped working on November 1, 2017 because of her conditions. Tr. 324.

14 **STANDARD OF REVIEW**

15 A district court's review of a final decision of the Commissioner of Social
16 Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is
17 limited; the Commissioner's decision will be disturbed "only if it is not supported
18 by substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153,
19 1158 (9th Cir. 2012). "Substantial evidence" means "relevant evidence that a
20 reasonable mind might accept as adequate to support a conclusion." *Id.* at 1159
21 (quotation and citation omitted). Stated differently, substantial evidence equates to

1 “more than a mere scintilla[,] but less than a preponderance.” *Id.* (quotation and
2 citation omitted). In determining whether the standard has been satisfied, a
3 reviewing court must consider the entire record as a whole rather than searching
4 for supporting evidence in isolation. *Id.*

5 In reviewing a denial of benefits, a district court may not substitute its
6 judgment for that of the Commissioner. “The court will uphold the ALJ’s
7 conclusion when the evidence is susceptible to more than one rational
8 interpretation.” *Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th Cir. 2008).
9 Further, a district court will not reverse an ALJ’s decision on account of an error
10 that is harmless. *Id.* An error is harmless where it is “inconsequential to the
11 [ALJ’s] ultimate nondisability determination.” *Id.* (quotation and citation omitted).
12 The party appealing the ALJ’s decision generally bears the burden of establishing
13 that it was harmed. *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009).

14 **FIVE-STEP EVALUATION PROCESS**

15 A claimant must satisfy two conditions to be considered “disabled” within
16 the meaning of the Social Security Act. First, the claimant must be “unable to
17 engage in any substantial gainful activity by reason of any medically determinable
18 physical or mental impairment which can be expected to result in death or which
19 has lasted or can be expected to last for a continuous period of not less than 12
20 months.” 42 U.S.C. § 423(d)(1)(A). Second, the claimant’s impairment must be
21 “of such severity that he is not only unable to do his previous work[,] but cannot,

1 considering his age, education, and work experience, engage in any other kind of
2 substantial gainful work which exists in the national economy.” 42 U.S.C. §
3 423(d)(2)(A).

4 The Commissioner has established a five-step sequential analysis to
5 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §§
6 404.1520(a)(4)(i)-(v), 416.920(a)(4)(i)-(v). At step one, the Commissioner
7 considers the claimant’s work activity. 20 C.F.R. §§ 404.1520(a)(4)(i),
8 416.920(a)(4)(i). If the claimant is engaged in “substantial gainful activity,” the
9 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
10 404.1520(b), 416.920(b).

11 If the claimant is not engaged in substantial gainful activity, the analysis
12 proceeds to step two. At this step, the Commissioner considers the severity of the
13 claimant’s impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If the
14 claimant suffers from “any impairment or combination of impairments which
15 significantly limits [his or her] physical or mental ability to do basic work
16 activities,” the analysis proceeds to step three. 20 C.F.R. §§ 404.1520(c),
17 416.920(c). If the claimant’s impairment does not satisfy this severity threshold,
18 however, the Commissioner must find that the claimant is not disabled. 20 C.F.R.
19 §§ 404.1520(c), 416.920(c).

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1 At step three, the Commissioner compares the claimant's impairment to
2 severe impairments recognized by the Commissioner to be so severe as to preclude
3 a person from engaging in substantial gainful activity. 20 C.F.R. §§
4 404.1520(a)(4)(iii), 416.920(a)(4)(iii). If the impairment is as severe or more
5 severe than one of the enumerated impairments, the Commissioner must find the
6 claimant disabled and award benefits. 20 C.F.R. §§ 404.1520(d), 416.920(d).

7 If the severity of the claimant's impairment does not meet or exceed the
8 severity of the enumerated impairments, the Commissioner must pause to assess
9 the claimant's "residual functional capacity." Residual functional capacity (RFC),
10 defined generally as the claimant's ability to perform physical and mental work
11 activities on a sustained basis despite his or her limitations, 20 C.F.R. §§
12 404.1545(a)(1), 416.945(a)(1), is relevant to both the fourth and fifth steps of the
13 analysis.

14 At step four, the Commissioner considers whether, in view of the claimant's
15 RFC, the claimant is capable of performing work that he or she has performed in
16 the past (past relevant work). 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).
17 If the claimant is capable of performing past relevant work, the Commissioner
18 must find that the claimant is not disabled. 20 C.F.R. §§ 404.1520(f), 416.920(f).
19 If the claimant is incapable of performing such work, the analysis proceeds to step
20 five.
21

1 At step five, the Commissioner considers whether, in view of the claimant's
2 RFC, the claimant is capable of performing other work in the national economy.
3 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v). In making this determination,
4 the Commissioner must also consider vocational factors such as the claimant's age,
5 education and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),
6 416.920(a)(4)(v). If the claimant is capable of adjusting to other work, the
7 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
8 404.1520(g)(1), 416.920(g)(1). If the claimant is not capable of adjusting to other
9 work, analysis concludes with a finding that the claimant is disabled and is
10 therefore entitled to benefits. 20 C.F.R. §§ 404.1520(g)(1), 416.920(g)(1).

11 The claimant bears the burden of proof at steps one through four. *Tackett v.*
12 *Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to step five,
13 the burden shifts to the Commissioner to establish that (1) the claimant is capable
14 of performing other work; and (2) such work "exists in significant numbers in the
15 national economy." 20 C.F.R. § 404.1560(c)(2); *Beltran v. Astrue*, 700 F.3d 386,
16 389 (9th Cir. 2012).

17 ALJ'S FINDINGS

18 At step one, the ALJ found that Plaintiff had engaged in substantial gainful
19 activity from January 1, 2019 through the date of the decision, but there had been a
20 continuous 12-month period during which she did not engage in substantial gainful
21 activity. Tr. 18. At step two, the ALJ found that Plaintiff had the following severe

1 impairments: obesity; headaches; personality disorder; methamphetamine use
2 disorder; PTSD; and major depressive disorder. Tr. 18. At step three, the ALJ
3 found that Plaintiff did not have an impairment or combination of impairments that
4 meet or medically equaled the severity of a listed impairment through the date last
5 insured. Tr. 19. The ALJ then found that Plaintiff had the RFC to perform
6 medium work as defined in 20 CFR §§ 404.1567(c), 416.967(c) with the following
7 limitations:

8 she may never climb ladders, ropes, or scaffolds or work with
9 concentrated exposure to hazards. She is able to understand and
10 remember 1-3 step instructions with infrequent contact with the general
11 public which would be incidental to job duties. She would do best with
12 work that does not require close coordination with supervisors or peers.

11 Tr. 20.

12 At step four, the ALJ identified Plaintiff's past relevant work as a warehouse
13 worker and a housekeeper and found that she could perform this past relevant
14 work. Tr. 26. The ALJ then made an alternative step five finding that, considering
15 Plaintiff's age, education, work experience, and RFC, there were other jobs that
16 exist in significant numbers in the national economy that Plaintiff could perform,
17 including: laundry worker; auto detailer; and hospital cleaner. Tr. 26-27. The ALJ
18 concluded that Plaintiff was not under a disability, as defined in the Social Security
19 Act, from November 1, 2017 through the date of his decision. Tr. 27.

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ISSUES

Plaintiff seeks judicial review of the Commissioner's final decision denying her SSDI under Title II and SSI under Title XVI of the Social Security Act. ECF No. 13. Plaintiff raises the following issues for this Court's review:

1. Whether the ALJ properly addressed Plaintiff's symptom statements; and
2. Whether the ALJ properly addressed the medical opinions.

DISCUSSION

1. Plaintiff's Symptom Statements

Plaintiff argues that the ALJ erred in his treatment of her symptom statements. ECF No. 13 at 6-15.

An ALJ engages in a two-step analysis when evaluating a claimant's testimony regarding subjective pain or symptoms. "First, the ALJ must determine whether the claimant has presented objective medical evidence of an underlying impairment which could reasonably be expected to produce the pain or other symptoms alleged." *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009). "The claimant is not required to show that his impairment could reasonably be expected to cause the severity of the symptom he has alleged; he need only show that it could reasonably have caused some degree of the symptom." *Id.*

Second, "[i]f the claimant meets the first test and there is no evidence of malingering, the ALJ can only reject the claimant's testimony about the severity of the symptoms if [the ALJ] gives 'specific, clear and convincing reasons' for the

1 rejection.” *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (internal
2 citations and quotations omitted).

3 The ALJ stated that Plaintiff’s “statements concerning the intensity,
4 persistence and limiting effects of these symptoms are not entirely consistent with
5 the medical evidence and other evidence in the record for the reasons explained in
6 this decision.” Tr. 21. The ALJ gave six reasons for rejecting Plaintiff’s symptom
7 statements: (1) her allegations of disabling headaches are uncorroborated by
8 findings on physical examination, Tr. 21; (2) her allegations of headaches and
9 mental health symptoms are inconsistent with her appearing in no acute distress,
10 Tr. 21, 22; (3) her headaches and mental health symptoms have been responsive to
11 medications, Tr. 21, 22; (4) her mental health allegations are inconsistent with her
12 unremarkable appearance and performance at a formal mental status examination
13 in November of 2017, Tr. 22; (5) there is “a significant situational component
14 contributing to the claimant’s mental health symptoms indicating that her
15 symptoms are not as chronic or severe as alleged,” Tr. 23; and (6) her alleged
16 symptoms are undermined by her constant indications to providers that she is
17 capable of work, Tr. 23.

18 The ALJ’s first reason for rejecting Plaintiff’s symptom statements, that her
19 complaints of headaches are uncorroborated by findings on physical examination,
20 is not specific, clear and convincing. An ALJ may cite inconsistencies between a
21 claimant’s testimony and the objective medical evidence in discounting the

1 claimant's testimony. *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1227
2 (9th Cir. 2009). The ALJ found that Plaintiff that reported that her headaches
3 occurred several times per week, but determined that "[h]er allegations of disabling
4 headaches are likewise uncorroborated by findings on physical examination." Tr.
5 21. Plaintiff challenges this finding by alleging that she did not include migraines
6 as an impairment that limited her ability to work nor did the ALJ point to any
7 testimony to her impairments limited her ability to work. ECF No. 13 at 7. She
8 did not include headaches on most of the forms submitted to Social Security. Tr.
9 304-11, 324, 361-67 However, on appeal Plaintiff did include headaches on a
10 form and claimed that as of May 2018 her migraines had increased in severity. Tr.
11 370. The ALJ included citations to Plaintiff's reports to providers that she
12 experienced frequent migraines in his decision. Tr. 21 *citing* Tr. 570 (On April 10,
13 2018, Plaintiff reported weeks on end with daily headaches, vision changes, and
14 nausea lasting six to twelve hours.); Tr. 545 (On October 23, 2018, Plaintiff
15 reported having three migraines in the past two weeks, previously she was having
16 migraines three or four days a week.); Tr. 628 (In November of 2018, Plaintiff
17 stated that she experienced headaches on a patient intake form.); Tr. 541 (On
18 December 24, 2018, Plaintiff reported that she had experienced one migraine in the
19 last two weeks.). The ALJ found that normal neurological exams undermined
20 these reports to her providers. Tr. 21. However, migraines are not inconsistent
21 with normal neurological findings. Neurological tests are used to rule out diseases

1 of the brain or nerves that may cause headaches or migraines, not as evidence that
2 the headaches are nonexistent. *See* S.S.R. 19-4p. Therefore, this fails to meet the
3 specific, clear and convincing standard.

4 The ALJ's second reason for rejecting Plaintiff's symptom statements, that
5 her complaints of headaches and mental health symptoms are inconsistent with her
6 appearing in no acute distress, is not specific, clear and convincing. An ALJ may
7 cite inconsistencies between a claimant's testimony and the objective medical
8 evidence in discounting the claimant's testimony. *Bray*, 554 F.3d at 1227.

9 However, district courts have questioned the applicability of the generic chart note
10 of "no acute distress" to chronic conditions such as Plaintiff's headaches and
11 mental health impairments. *See Toni D. v. Saul*, No. 3:19-cv-820-SI, 2020 WL
12 1923161, at *6 (D. Or. April 21, 2020) *citing*, *Mitchell v. Saul*, No. 2:18-cv-01501-
13 GMN-WGC, 2020 WL 1017907, at *7 (D. Nev. Feb. 13, 2020) ("Moreover, the
14 court agrees with Plaintiff that notations that Plaintiff was healthy 'appearing' and
15 in no 'acute' distress do not distract from the findings regarding Plaintiff's chronic
16 conditions."); *Richard F. v. Comm'r of Soc. Sec.*, No. C19-5220 JCC, 2019 WL
17 6713375, at *7 (W.D. Wash. Dec. 10, 2019) ("Clinical findings of 'no acute
18 distress' do not undermine Plaintiff's testimony. 'Acute' means 'of recent or
19 sudden onset; contrasted with chronic.' Oxford English Dictionary, acute (3d ed.
20 December 2011). Plaintiff's impairments are chronic, not acute."). Here, because
21 Plaintiff suffered from chronic impairments, she would appear in no acute distress

1 unless she was presently experiencing a headache or an anxiety attack. Therefore,
2 the generic chart note of “no acute distress” is not a specific, clear and convincing
3 reason to discount Plaintiff’s symptom testimony.

4 The ALJ’s third reason to reject Plaintiff’s symptom statements, that her
5 mental health symptoms improved with treatment and were partially controlled
6 with treatment, is specific, clear and convincing. The Ninth Circuit has held that
7 impairments controlled by medication are not disabling. *Warre v. Comm’r of Soc.*
8 *Sec. Admin.*, 439 F.3d 1001, 1006 (9th Cir. 2006). Here, substantial evidence
9 supports a finding that Plaintiff’s headaches improved in 2018. In April of 2018,
10 Plaintiff reported weeks on end with daily headaches, vision changes, and nausea
11 lasting six to twelve hours. Tr. 570. On October 23, 2018, Plaintiff reported
12 having three migraines in the past two weeks, which was an improvement from her
13 prior reports of migraines three or four days a week. Tr. 545. By December of
14 2018, Plaintiff reported only one headache in the last two weeks. Tr. 541. This
15 improvement is attributed Plaintiff taking Topamax. Tr. 545, 565. Likewise, the
16 record demonstrates that Plaintiff’s mental health symptoms improved during this
17 time. Tr. 571 (Plaintiff stated that the increase in citalopram was working and she
18 was able to stay more focused); Tr. 564 (Plaintiff reported that the citalopram was
19 working, but she did experience a panic attack last week); Tr. 543 (Plaintiff
20 reported that her depression and anxiety were doing well with citalopram and
21 buspirone). Therefore, the record supports the ALJ’s determination that Plaintiff’s

1 impairments improved with medication and are at least partially controlled with
2 medication. This meets the specific, clear and convincing standard.

3 The ALJ's fourth reason for rejecting Plaintiff's symptom statements, that
4 her mental health allegations are inconsistent with her unremarkable appearance
5 and performance at a formal mental status examination in November of 2017, is
6 specific, clear and convincing. On November 21, 2017, Dr. Pratt evaluated
7 Plaintiff and reported normal observations. Tr. 450. The mental status
8 examination was also normal. Tr. 450-51. Therefore, this meets the specific, clear
9 and convincing standard.

10 The ALJ's fifth reason for rejecting Plaintiff's symptom statements, that her
11 mental health symptoms were attributed to situational stressors, is specific, clear
12 and convincing. An ALJ may reasonably find a claimant's symptom testimony
13 less credible where the evidence "squarely support[s]" a finding that the claimant's
14 impairments are attributable to situational stressors rather than impairments.
15 *Wright v. Colvin*, No. 13-CV-3068-TOR, 2014 WL 3729142, at *5 (E.D. Wash.
16 July 25, 2014) ("Plaintiff testified that she would likely be able to maintain full-
17 time employment but for the 'overwhelming' stress caused by caring for her family
18 members"). Plaintiff reported stressors such as child custody dispute,
19 unemployment, and the lack of transportation. Tr. 543-44, 547. Once the lack of
20 transportation was resolved, her provider reported that her symptoms were
21 improved due to having her own vehicle. Tr. 543. Therefore, the ALJ's

1 determination is supported by substantial evidence and meets the specific, clear
2 and convincing standard.

3 The ALJ's sixth reason for rejecting Plaintiff's symptom statements, that
4 Plaintiff consistently reported to her providers that she was able to work, is
5 specific, clear and convincing. Plaintiff asserts that although she indicated she
6 wanted to go back to work various times, that does not mean she had the ability to
7 work. ECF No. 13 at 12. The Ninth Circuit has found that "[a] willingness to try
8 to engage in rehabilitative activity and a release by one's doctor to engage in such
9 an attempt is clearly not probative of a present ability to engage in such activity."
10 *Cox v. Califano*, 587 F.2d 988, 991 (9th Cir. 1978). However, Plaintiff not only
11 expressed a desire to go back to work, she did go back to work and earned income
12 exceeding the substantial gainful activity level. Tr. 295 (showing \$4,881.00 in
13 earnings for the first quarter of 2019). Therefore, this meets the specific, clear and
14 convincing standard.

15 Plaintiff also asserts that the ALJ rejected Plaintiff's symptom statements
16 because there was no evidence of significant complications related to obesity. ECF
17 No. 13 at 6. While the ALJ found that Plaintiff's statements were "not entirely
18 consistent with the medical evidence" and then summarized the evidence in the
19 record relating to obesity, Tr. 21, the ALJ never made a finding that the medical
20 evidence of obesity undermined Plaintiff's statements. While there is some
21 argument that the Court could infer this reason from the ALJ's decision, without a

1 specific statement as to how this reason undermined Plaintiff's symptom
2 statements, it falls short of the required specific, clear and convincing standard.
3 The Ninth Circuit has held that "[t]his is not an easy requirement to meet: The
4 clear and convincing standard is the most demanding required in Social Security
5 cases." *Garrison v. Colvin*, 759 F.3d 995, 1014 (9th Cir. 2014) *citing Moore v.*
6 *Comm'r of Soc. Sec. Admin.*, 278 F.3d 920, 924 (9th Cir. 2002) (internal citations
7 omitted).

8 Here, some of the reasons provided by the ALJ for rejecting Plaintiff's
9 symptom statements failed to meet the specific, clear and convincing standard.
10 However, several do meet this standard. Therefore, any error would be harmless.
11 *See Carmickle v. Comm'r, Soc. Sec. Admin.*, 533 F.3d 1155, 1163 (9th Cir. 2008)
12 (upholding an adverse credibility finding where the ALJ provided four reasons to
13 discredit the claimant, two of which were invalid); *Batson v. Comm'r of Soc. Sec.*
14 *Admin.*, 359 F.3d 1190, 1197 (9th Cir. 2004) (affirming a credibility finding where
15 one of several reasons was unsupported by the record); *Tommasetti*, 533 F.3d at
16 1038 (an error is harmless when "it is clear from the record that the . . . error was
17 inconsequential to the ultimate nondisability determination").

18 **2. Medical Source Opinions**

19 Plaintiff challenges the ALJ's determination regarding the persuasiveness of
20 the opinions from John F. Robinson, Ph.D. and Daniel Pratt, Psy.D. ECF No. 13 at
21 15-21.

1 For claims filed on or after March 27, 2017, new regulations apply that
2 change the framework for how an ALJ must weigh medical opinion evidence.
3 *Revisions to Rules Regarding the Evaluation of Medical Evidence*, 2017 WL
4 168819, 82 Fed. Reg. 5844 (Jan. 18, 2017); 20 C.F.R. §§ 404.1520c, 416.920c.
5 The new regulations provide that the ALJ will no longer give any specific
6 evidentiary weight to medical opinions or prior administrative medical findings,
7 including those from treating medical sources. 20 C.F.R. §§ 404.1520c(a),
8 416.920c(a). Instead, the ALJ will consider the persuasiveness of each medical
9 opinion and prior administrative medical finding, regardless of whether the
10 medical source is an Acceptable Medical Source. 20 C.F.R. §§ 404.1520c(c),
11 416.920c(c). The ALJ is required to consider multiple factors, including
12 supportability, consistency, the source's relationship with the claimant, any
13 specialization of the source, and other factors (such as the source's familiarity with
14 other evidence in the file or an understanding of Social Security's disability
15 program). *Id.* The regulations emphasize that the supportability and consistency
16 of the opinion are the most important factors, and the ALJ must articulate how he
17 considered those factors in determining the persuasiveness of each medical opinion
18 or prior administrative medical finding. 20 C.F.R. §§ 404.1520c(b), 416.920c(b).
19 The ALJ may explain how he considered the other factors, but is not required to do
20 so, except in cases where two or more opinions are equally well-supported and
21 consistent with the record. *Id.*

1 Supportability and consistency are further explained in the regulations:

2 (1) *Supportability*. The more relevant the objective medical evidence
3 and supporting explanations presented by a medical source are to
4 support his or her medical opinion(s) or prior administrative medical
finding(s), the more persuasive the medical opinions or prior
administrative medical finding(s) will be.

5 (2) *Consistency*. The more consistent a medical opinion(s) or prior
6 administrative medical finding(s) is with the evidence from other
7 medical sources and nonmedical sources in the claim, the more
persuasive the medical opinion(s) or prior administrative medical
finding(s) will be.

20 C.F.R. §§ 404.1520c(c), 416.920c(c).

8 **A. John F. Robinson, Ph.D.**

9 On January 29, 2018, Dr. Robinson completed a mental RFC. Tr. 91-93.

10 He opined that Plaintiff was able to understand and remember simple one to three
11 step instructions, Tr. 91, that she was able to maintain attention and concentration
12 for periods up to two hours at a time for simple and routine tasks (SVP 1-2), Tr.
13 92, that she was able to complete a normal work day and work week with no more
14 than customary breaks, Tr. 92, that she was able to perform work with infrequent
15 contact with the general public which is incidental to her job duties, Tr. 92, that she
16 was able to accept supervision but would do best with work that does not require
17 close coordination with supervisors or peers, Tr. 92, and that she was capable of
18 adjusting to the demands of a routine work environment with predictable job duties
19 and expectations, Tr. 93. The ALJ found the opinion to be persuasive, Tr. 23, and
20 included the limitations opined in the RFC determination, Tr. 20.

1 Plaintiff argues that the ALJ cannot rely on this opinion because Dr.
2 Robinson did not meet the requirements of 20 C.F.R. § 404.1616(c)-(d). ECF No.
3 13 at 16. Regulations require that a psychological consultant be a licensed or
4 certified psychologist at the independent practice level of psychology by the State
5 in which he or she practices. 20 C.F.R. § 404.1616(d)(1). On August 27, 2020,
6 Social Security updated Plaintiff's file with a note that "[t]he file includes a
7 reconsideration determination signed by an individual who did not meet the
8 qualifications of a psychologist consultant because s/he had a restricted license
9 when s/he signed the determination." Tr. 395. Defendant does not challenge
10 Plaintiff's assertion that the August 27, 2020 note in the file refers to Dr. Robinson,
11 but argues that any error is harmless because the opinion of Dan Donahue, Ph.D. is
12 the same as that of Dr. Robinson. ECF No. 14 at 12-13.

13 First, the August 27, 2020 note in the file does not state which provider had
14 the restricted license. Instead, it states that the psychologist consultant that signed
15 the reconsideration determination had the restricted license. Tr. 395. Dr.
16 Robinson provided the opinion on the initial denial, and Dr. Donahue provided the
17 opinion on reconsideration. Tr. 90-93, 123-26. Plaintiff did not submit any
18 licensing information from the State to support her assertion that the restricted
19 license in the note referred to Dr. Robinson.

20 Second, Defendant is accurate that Dr. Donahue's opinion is identical to Dr.
21 Robinson's. Tr. 90-93, 123-26. The ALJ also found Dr. Donahue's opinion to be

1 persuasive. Tr. 21. Therefore, regardless of who had the restricted license, any
2 error would be harmless because the psychological consultant with the valid
3 license provided the same opinion as the psychological consultant with a restricted
4 license. *See Tommasetti*, 533 F.3d at 1038 (An error is harmless when “it is clear
5 from the record that the . . . error was inconsequential to the ultimate nondisability
6 determination.”).

7 Plaintiff argues any error in Dr. Robinson’s licensing is harmful because Dr.
8 Donahue’s opinion was a mere concurrence with Dr. Robinson’s opinion. ECF
9 No. 15 at 7. While Dr. Donahue’s opinion is the same as Dr. Robinson’s, there is
10 no indication that Dr. Donahue relied solely on Dr. Robinson’s opinion when
11 forming his own. ECF No. 123-26. Therefore, the Court will not disturb the
12 ALJ’s determination.

13 **B. Daniel Pratt, Psy.D.**

14 In November of 2017, Dr. Pratt evaluated Plaintiff and completed
15 Psychological/Psychiatric Evaluation for the Washington State Department of
16 Social and Health Services. Tr. 499-503. He diagnosed Plaintiff with unspecified
17 depressive disorder, unspecified personality disorder, rule out borderline
18 personality disorder, and rule out attention-deficit/hyperactivity disorder. Tr. 501.
19 He opined that Plaintiff had a marked limitation in the abilities to adapt to changes
20 in a routine setting, to maintain appropriate behavior in a work setting, and to
21 complete a normal work day and work week without interruptions from

1 psychologically based symptoms. Tr. 501. He opined that Plaintiff had a
2 moderate limitation in the remaining basic work activities. *Id.* He opined that the
3 limitation would last for nine to twelve months with available treatment. *Id.*

4 The ALJ found the opinion to be not persuasive for five reasons: (1) it was
5 inconsistent with the record; (2) it was inconsistent with the observations by
6 providers; (3) it was inconsistent with the fact that Plaintiff's symptoms appear tied
7 to situational stressors; (4) it was inconsistent with the evidence that Plaintiff's
8 mental conditions were responsive to medication, it was inconsistent with
9 Plaintiff's statements that she was searching for work and that she was capable of
10 work; and (5) it was inconsistent with Dr. Pratt's own observations of Plaintiff and
11 her performance on the formal mental testing administered in November of 2017.
12 Tr. 24.³

13 Here, the ALJ discussed the required factors of supportability and
14 consistency as set forth in 20 C.F.R. §§ 404.1520c(c), 416.920c(c). In discussing
15 supportability, the ALJ found that Dr. Pratt's own observations and formal testing
16

17 ³In supporting these reasons, the ALJ refers to "Finding #5," Tr. 24, which is
18 the ALJ's step three determination, Tr. 19. However, this appears to be a
19 scrivener's error as this portion of the decision also refers to "Finding #5." Tr. 19.
20 In reading the document as a whole, the ALJ is referring to his analysis of
21 Plaintiff's symptom statements under Funding #6.

1 in November of 2017 was inconsistent with the opinion. Tr. 24. Dr. Pratt's
2 observations were normal and the mental status exam was normal. Tr. 502-03.
3 Therefore, in discussing supportability, the ALJ's determination is supported by
4 substantial evidence.

5 In discussing consistency, the ALJ found that Dr. Pratt's opinion was
6 inconsistent with the observations of other providers. Tr. 24. This is supported by
7 substantial evidence. Tr. 459 ("seems awake, alert and cooperative."); Tr. 465,
8 490 ("alert, conversant and cooperative without any overt depressive findings.");
9 Tr. 492 ("Alert, oriented, pleasant, speech not pressured, no suggestion of anxiety,
10 depression or agitation. Thoughts are organized."). The lack of observed
11 symptoms of depression, agitation, or anxiety speaks to the consistency of the
12 opinion, and the Court will not disturb the ALJ's treatment of the opinion.

13 CONCLUSION

14 A reviewing court should not substitute its assessment of the evidence for
15 the ALJ's. *Tackett*, 180 F.3d at 1098. To the contrary, a reviewing court must
16 defer to an ALJ's assessment so long as it is supported by substantial evidence. 42
17 U.S.C. § 405(g). After review, the court finds the ALJ's decision is supported by
18 substantial evidence and free of harmful legal error.

19 ACCORDINGLY, IT IS HEREBY ORDERED:

20 1. Plaintiff's Motion for Summary Judgment, ECF No. 13, is **DENIED**.
21

2. Defendant's Motion for Summary Judgment, ECF No. 14, is

GRANTED.

The District Court Executive is hereby directed to enter this Order and provide copies to counsel, enter judgment in favor of the **Defendant**, and **CLOSE** the file.

DATED: October 13, 2021.



A handwritten signature in blue ink that reads "Stanley A. Bastian". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Stanley A. Bastian
Chief United States District Judge